



("Caravaignac") and TV Globo Internacional ("TV Globo").

Plaintiff alleges that Superstation and Caravaignac breached an implied contract and defamed him and that all three defendants committed various other torts against him. Superstation and Caravaignac have denied the allegations, counterclaimed against plaintiff and filed a third party complaint against plaintiff's wife, Patricia Vaz Gabriel ("Ms. Gabriel").

Pending before the Court are plaintiff's motion for a preliminary injunction and TV Globo's motion to dismiss for failure to state a claim upon which relief can be granted.

#### **I. Background**

TV Globo is a Delaware corporation that broadcasts programming in Portuguese in the United States and elsewhere.

Superstation is a Florida corporation that acts as a broker for TV Globo with respect to businesses that choose to advertise on TV Globo and, in some cases, the advertising agents that represent those businesses.<sup>1</sup> Superstation claims to be the exclusive representative of TV Globo in the United States but also an independent contractor. Cavaignac is its president.

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<sup>1</sup> Black's Law Dictionary (7th ed. 1999) defines "agent" as "[o]ne who is authorized to act for or in place of another; a representative" and "broker" as "[a]n agent who acts as an intermediary or negotiator, especially between prospective buyers and sellers." The Court will refer to Superstation as a "broker" and Gabriel as an "agent" based on its understanding of their business models at this stage of the case. Its use of those terms is for convenience only and has no bearing upon liability or any other legal issue in this case.

Gabriel, doing business as Aura, produces advertisements and acts as an advertising agent for his clients, which are mostly businesses that cater to the Portuguese-speaking, Brazilian population of Massachusetts and New Hampshire.<sup>2</sup> Gabriel produces (i.e. films) advertisements for his clients and represents them in some capacity in their dealings with Superstation. For example, he obtains from each client a signed letter explaining that Aura is authorized to represent the client, faxes such letters to Superstation and registers clients on Superstation's website where he lists Aura as the client's agent. Superstation emails directly to the clients a user name and password but apparently Gabriel requires his clients to provide him with that information so that he can log in to Superstation's website on their behalf.<sup>3</sup> Clients pay Superstation directly for the advertising time on TV Globo, however, and Superstation remits a percentage of such payments to Gabriel (and other agents) on a monthly basis. Superstation pays another portion to TV Globo for the advertising and retains

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<sup>2</sup> In his submissions to the Court, Gabriel refers to the businesses with whom he works as both "clients" and "customers" and to those businesses collectively both as his "customer list" and "client base". To be consistent, the Court will use the terms "clients" and "client list".

<sup>3</sup> Although the parties dispute whether certain businesses are "clients" of Superstation or of Gabriel or of both, the Court takes no position at this stage of the case and will simply refer to such businesses as "mutual clients".

the balance as its commission. There is no written contract between Gabriel and Superstation.

In 2013, Superstation learned that Gabriel had allegedly been demanding and accepting payments due to Superstation from his clients, and then paying Superstation out of his personal account when Superstation demanded the money, rather than instructing clients to pay Superstation directly. Superstation also alleges that it was informed by a former client of Gabriel that it had paid Gabriel for a commercial that never aired. Furthermore, Superstation contends that Gabriel and his wife have, on multiple occasions, misrepresented to clients that they are required to use Aura as their agent if they choose to advertise on TV Globo. Finally, according to Superstation, Ms. Gabriel has been verbally abusive to Superstation's employees on multiple occasions when asked about missing payments.

Superstation's attorney sent a letter to Gabriel in August, 2013, requesting that plaintiff and his wife communicate with Superstation only by email in the future due to Ms. Gabriel's behavior. It also reminded them that they were not authorized to receive payments intended for Superstation or TV Globo or to act or speak on behalf of Superstation or TV Globo. The letter also notes that Superstation is TV Globo's "exclusive advertising representative for the United States and Canada."

Ms. Gabriel responded by sending an email to mutual clients shortly thereafter accusing Cavaignac of being dishonest and of committing crimes in his capacity as TV Globo's representative. Gabriel alleges that Cavaignac contacted several of Gabriel's clients in August or September, 2013, directly and offered them a new advertising package. Gabriel avers that he had previously instructed Cavaignac that he did not want his clients to deal directly with Cavaignac or buy the subject advertising package because he did not think the terms were favorable. He also claims that Cavaignac slandered him in a deliberate attempt to induce or intimidate his clients into buying advertising packages directly from Superstation rather than through Aura. In particular, he alleges that Cavaignac told his clients that Gabriel was investing their payments in "speculative ventures".

In a September, 2013 letter, Superstation's attorney notified Gabriel that Superstation and TV Globo would honor existing contracts but would not enter into any future contracts with clients who were represented by Gabriel. The letter accused Gabriel and his wife of slandering Cavaignac and Superstation. Superstation also informed mutual clients that it would not enter into new contracts involving Gabriel as the agent but would continue to air commercials under existing contracts negotiated by Gabriel until such contracts expired. At the motion hearing in this case, Superstation's counsel

clarified that it would continue to accept new commercials that were produced and shot by Gabriel and therefore clients could continue to work with Gabriel so long as Gabriel did not contact Superstation on their behalf about scheduling.

Gabriel, through counsel, sent Superstation and Cavaignac a cease and desist letter at about that time. Shortly thereafter, Ms. Gabriel sent an email to mutual clients asserting that Superstation is not authorized to communicate directly with Aura's clients without Aura's express written consent.

Superstation avers that mutual clients who received that email have contacted Superstation to express their desire to continue to work with it in order to place their advertisements on TV Globo and no client has asked Superstation to communicate with it solely through Aura.

## **II. Procedural history**

Gabriel filed his Complaint in the Massachusetts Superior Court for Essex County in October, 2013. He alleges that Superstation breached an implied contract (Count 1) and the covenant of good faith and fair dealing (Count 2) and that Cavaignac defamed him by telling clients that he misappropriated funds (Count 3). He also claims that all defendants were unjustly enriched by misappropriating his client list (Count 4), intentionally interfered with his advantageous business

relationships (Count 5) and engaged in unfair or deceptive business practices in violation of M.G.L. c. 93A (Count 6).

Defendants removed the case to this Court on diversity grounds in November, 2013. Shortly thereafter, Gabriel moved for a preliminary injunction against Superstation and Cavaignac and they, in turn, filed a Counterclaim against Gabriel and a Third Party Complaint against Ms. Gabriel, alleging defamation, intentional interference with contractual relationships and violations of M.G.L. c. 93A. TV Globo moved to dismiss the claims against it in December, 2013.

### **III. Plaintiff's motion for a preliminary injunction**

Gabriel has moved for a preliminary injunction that would require Superstation and Cavaignac 1) to refrain from communicating with any of plaintiff's clients without plaintiff's consent and participation and 2) to continue to "perform" under a purported implied contract with plaintiff.

#### **A. Legal standard**

A preliminary injunction is an "extraordinary and drastic remedy [that] is never awarded as of right." Munaf v. Green, 553 U.S. 674, 689-90 (2008) (internal quotation marks and citations omitted). In order to obtain a preliminary injunction, the moving party must establish

that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

equities tips in [its] favor, and that an injunction is in the public interest.

Voices of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 (2008)).

#### **B. Application**

Gabriel has not carried his burden of establishing that he is entitled to preliminary injunctive relief and his motion will therefore be denied. First, the Court is not convinced that he is likely to prevail on the merits of his claims because apparently 1) Superstation has plausible reasons for ceasing to work with him and informing mutual clients accordingly and 2) there is no enforceable contract between the parties. Furthermore, even if Gabriel ultimately prevails on his claims, the Court is not convinced that any harm cannot be compensated with money damages based on expected profits over time from representing clients before Superstation. Finally, it would be unduly burdensome to Superstation and not in the public interest to order specific performance on an unsubstantiated oral contract or to forbid Superstation from communicating with its own clients with whom it has ongoing business relationships.

#### **IV. TV Globo's motion to dismiss**

TV Globo has also moved to dismiss the claims against it for failure to state a claim upon which relief can be granted.



It contends that Gabriel has not alleged any facts that would subject it to direct liability on the claims alleged and denies that it may be held vicariously liable for the actions of Superstation and Cavaignac.

**A. Legal standard**

To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In considering the merits of a motion to dismiss, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). Yet "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not suffice to state a cause of action. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Accordingly, a complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of anything more than the mere possibility of misconduct. Id. at 679.

**B. Application**

The Court agrees with TV Globo that Gabriel has not alleged facts that would suffice to hold TV Globo directly liable for any of the claims against it. It is a closer question, however,

whether Gabriel has stated a plausible claim that Superstation and Cavaignac are agents of TV Globo such that TV Globo may be held vicariously liable for their allegedly tortious conduct.

An agency relationship is created when there is mutual consent, express or implied, that the agent is authorized to act on behalf of and for the benefit of the principal, subject to the principal's control. Theos & Sons, Inc. v. Mack Trucks, Inc., 729 N.E.2d 1113, 1119 (Mass. 2000). Under Massachusetts law, proof of agency is normally a question for the finder of fact. White's Farm Dairy, Inc. v. De Laval Separator Co., 433 F.2d 63, 66 (1st Cir. 1970). Moreover, even if an agency relationship exists, a principal is vicariously liable only if the conduct of the agent

is the kind [the agent] is employed to perform; if it occurs substantially within the authorized time and space limits; and if it is motivated, at least in part, by a purpose to serve the [principal].

Sarvis v. Bos. Safe Deposit & Trust Co., 711 N.E.2d 911, 920 (Mass. App. Ct. 1999) (quoting Wang Labs., Inc. v. Bus. Incentives, Inc., 501 N.E.2d 1163, 1166 (Mass. 1986)).

The Court finds that, even if Gabriel is correct that Superstation is an agent of TV Globo, Gabriel has not made any factual allegations that would tend to show that Superstation was acting within the scope of that agency when it allegedly misappropriated his client list by trying to persuade Gabriel's

clients to bypass him and work directly with Superstation. As a result, his claims against TV Globo will be dismissed. See Roggio v. City of Gardner, No. 10-40076, 2011 WL 1303141, at \*6-7 (D. Mass. Mar. 30, 2011) (allowing motion to dismiss when plaintiff failed to plead facts that the alleged conduct was of the kind expected of or commonly performed by agents of the principal).

**ORDER**

In accordance with the foregoing,

- 1) Plaintiff's motion for a preliminary injunction (Docket No. 9) is **DENIED**; and
- 2) Defendant TV Globo's motion to dismiss (Docket No. 28) is **ALLOWED**.

**So ordered.**

  
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Nathaniel M. Gorton  
United States District Judge

Dated February 7, 2014